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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 751

F. J. COSMARK, JOHN C. MARTIN and MELVIN D. PATTERSON, Individually, and as Representatives of a Class, *Petitioners*,

v.

STRUTHERS WELLS CORPORATION; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA (AFL-CIO); LOCAL 636 Thereof; RUSSELL A. GRAHAM, Individually; LEE A. REISINGER, DONALD E. CHAPEL and HARRY A. WILES, Individually, and as Representatives of a Class, *Respondents*.

On Petition For a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA, AFL-CIO, ET AL.

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To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Supreme Court of the State of Pennsylvania is reported at 412 Pa. 211, 194 A. 2d 325 and is printed in Appendix B, pages 26-35, of the Petition. The opinion of the Court of Common Pleas of Crawford County, No. 3, September Term 1960, not officially reported, is

printed as Appendix 1 to the Brief in Opposition of Struthers Wells Corporation.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does a state court have jurisdiction to entertain a suit by employees against their collective bargaining representative and their employer, based upon their allegation that their bargaining representative breached its duty of fair representation to them by agreeing to execute a provision in a collective bargaining agreement with the employer, which agreement resulted in a change in their seniority status and their layoff by the employer, which conduct arguably constitutes an unfair labor practice under Section 8 of the National Labor Relations Act?

STATUTE INVOLVED

Sections 7, 8(a), 8(b), 9(a), 10(a) and 10(c) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. Sections 157, 158(a), 158(b), 159(a), 160(a), and 160(c), (hereinafter referred to as the "Act") are set forth at pages 21 to 25 of Appendix A of the Petition.

STATEMENT OF THE CASE

Respondents, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, et al. (hereinafter, the Union), concur in the counter-statement of the case presented at pages 2 to 7 of the Brief in Opposition of Struthers Wells Corporation.

REASON WHY THE WRIT SHOULD BE DENIED

The Decision of the Pennsylvania Supreme Court Is Fully in Accord With the Applicable Decisions of This Court and Presents No Important Question of Federal Law.

The Pennsylvania Supreme Court, relying upon the pre-emption doctrine enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and reiterated only last term in *Local 100* v. *Borden*, 373 U.S. 690, held that the matters complained of were exclusively within the jurisdiction of the National Labor Relations Board, and affirmed the order of the Court of Common Pleas dismissing the action for lack of jurisdiction.

The Court held that the complaint was not based on a contractual claim which might bring it within the scope of Section 301 of the Act and the doctrine of this Court set forth in *Smith* v. *Evening News Association*, 371 U.S. 195. Specifically, the Court stated as follows:

> "However, the *only* actions which fall within that class of actions to which state courts' jurisdiction extends under the rationale of Evening News Association are '[s]uits for *violation of contracts* between an employer and a labor organization representing employees in an industry affecting commerce . . ., or between any such labor organizations . . .': (Emphasis supplied) Section 301 of the Labor Management Relations Act, supra, 29 U.S.C. § 185. If the action is not based upon a *violation* of the terms and provisions of a collective bargaining contract or agreement between a labor organization and an employer, then the state court has no jurisdiction. In Schatte v. International Stage Employees and Moving Picture Machine Operators, 84 F. Supp. 669, aff'd 182 F. 2d 158, reh. den. 183 F. 2d 685,

cert. den. 340 U.S. 827, 71 S. Ct. 64, reh. den. 340 U.S. 885, 71 S. Ct. 194, the court stated (84 F. Supp. 672): 'any right of recovery under Section 301 must rest upon a *contract* and its asserted violation. The whole Act relates to labor contracts, hence it must be a contract contemplated by the Act, i.e., a collective bargaining contract or contract relating to fair or unfair labor practices.' The plain and unambiguous language of the statute compels no other conclusion.

"The real crux of the Employees' complaint is stated in paragraph 20 of their complaint: 'The execution of the 1959 Agreement, and the actions and agreement of the [Employer] and the [International and Local] with relation to the seniority rights of the [Employees], the Forge Employees, were invalid, improper, void and illegal, for the reasons and averments hereinafter set forth, and resulted in the loss of all of the seniority rights of the [Employees] which they had accumulated prior to May 1, 1959 . . .' *Neither in paragraph 20 nor in any other portion of the complaint is there an averment of a violation of the 1959 collective bargaining agreement between the Unions and the Employer.* The thrust of the complaint is an attack upon the conduct of both the Unions and the Employer in the negotiations and the incidents which led to and resulted in the formation of the new seniority provisions in the 1959 agreement and a challenge to the bona fides of the Employer and the Union vis-a-vis the Employees. *In effect, the complaint seeks a rescission of the seniority provisions in the 1959 collective bargaining agreement* allegedly brought about by improper conduct on the part of the Unions and the Employer and the reinstatement of the pertinent seniority provisions of the 1957 collective bargaining agreement. *However, no violation of the collective bargaining agreement between the Unions*

and the Employer is averred and, absent such an averment, the instant case is clearly not within the class of actions contemplated by Section 301, supra, and the rationale of Evening News Association, supra.

"An examination and a study of this complaint clearly reveals that the basic general rule which excludes the jurisdiction of state courts applies and that the Employees' *exclusive* forum is the National Labor Relations Board and not the state courts. The Garmon rule commands the exclusion of this action from the jurisdiction of the state courts and the court below properly dismissed the complaint for lack of jurisdiction.

"That which the Supreme Court said in Borden, supra (373 U.S. 698) is presently applicable: 'In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.'" (Italics with underscoring in original; Italics only added.) (Appendix B to Petition, pages 33-35.)

This case arose as the result of preliminary objections, in the nature of a demurrer, to the complaint. The Supreme Court of Pennsylvania has ruled that "no violation of the collective bargaining agreement between the Union and the Employer is averred." It is clear that this ruling is correct, notwithstanding Petitioners' belated effort to correct their failure in pleading at the trial court level by setting forth their conclusions in the Petition for the Writ. It should be noted further that there is no explicit contradiction in the Petition of the Supreme Court of Pennsylvania's ruling on this point. Indeed, the ruling of the court below appears to be admitted by Petitioners' emphasis that the "gravamen"

of the complaint was the allegation with respect to the alleged breach of the duty of fair representation.

The Pennsylvania Supreme Court quite properly began its discussion of the preemption doctrine with this Court's pronouncement in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, that "[w]hen an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . ." In repeating this rule only last year in *Local 100* v. *Borden*, 373 U.S. 690, the Court noted that "the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." 373 U.S. at 694. Further, quoting from *Garmon, supra*, at page 246, the Court stated that "[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered."

This, then, is the test to be applied and the test which was applied by the court below. It is readily apparent that the instant case falls within neither of the exceptions to the preemption doctrine as specified in *Garmon*, namely, cases involving "conduct marked by violence and imminent threats to the public order." 359 U.S. at 247, citing *United Auto Workers* v. *Russell*, 356 U.S. 634, and *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656; or activity which is of "merely peripheral concern of the Labor Management Relations Act." 359 U.S. 243-244, citing *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

Thus, the only issue presented is whether the conduct of Respondents here is "arguably" subject to the National Labor Relations Act, as amended. The answer is clearly in the affirmative.

As Petitioners, themselves, candidly call to this Court's attention, the National Labor Relations Board has held, in *Miranda Fuel Company*, 140 NLRB 181, 185 (1962), that employees have the right, under Section 7 of the Act, to be free from any "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and that any such action by a statutory bargaining representative against employees it represents violates Section 8(b)(1)(A) of the Act and, when such action is an attempt to cause an employer to derogate the employment status of employees it represents, a violation of Section 8(b)(2). Similarly, to the extent that such actions are participated in by employers, their conduct violates Sections 8(a)(1) and 8(a)(3) of the Act. The Board stated that the question was whether the action of a union and employer in derogating an employee's employment status could be said to "encourage membership in any labor organization," and answered that question in the affirmative, relying principally upon this Court's decision in *Radio Officers Union* v. *NLRB*, 347 U.S. 17. The Board noted that "[t]he Supreme Court held in effect in the *Radio Officers* case that the requisite showing of encouragement of union membership was met in that case upon affirming the Board's rationale that such encouragement was the 'foreseeable result' of conduct which had union causation." 140 NLRB at 186.[1]

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[1] The United States Court of Appeals for the Second Circuit denied enforcement of the Board's order on December 11, 1963. Judge Medina, found that the Board was wrong with respect to its conclusions as to all sections mentioned above. Chief Judge Lumbard, concurring, agreed with Judge Medina only with respect to the 8(b)(2) and 8(a)(3) charges. He did not find it necessary to reach the question of the correctness of the Board's conclusion on the 8(b)(1)(A) and 8(a)(1) charges. The Chief Judge found that, even if there is a duty under 8(b)(1)(A), the evidence did not support the Board's conclusion there. Judge Friendly, dissenting, voted to uphold the Board's conclusions on all sections involved. Thus, two of the three judges rejected the *(Continued on Page 8)*

In spite of Petitioners' attempt to explain away *Miranda*, it is submitted that that case is dispositive of the issue presented. It represents the declaration of law by the agency charged with interpreting and administrating the Act and clearly encompasses the actions complained of in this case. While Respondents submit that the Board's decision in *Miranda* is correct, the "arguable" test is satisfied by the mere pendency of the question thus divesting the courts of jurisdiction. As one commentator has noted, the treatment by some courts of suits to enforce the duties of fair representation as an exception to the preemption doctrine occurred before, and is likely to be altered by, *Miranda* which "has now brought unfair representation *clearly* within the Board's regulatory power." Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16th Ann. Conf. on Labor 3, 18 (n. 47) (1963). (emphasis added)

It is further submitted that this case should not be used as a vehicle for examination of the Board's *Miranda* doctrine. If this Court should later wish to review that decision, the appropriate means of doing so is in a case involving enforcement of a Board decision based upon that doctrine, and one in which an actual case has been taken through the administrative process. It is respectfully submitted that such course would be preferable to receiving a brief *amicus curiae*.[2]

The decision of this Court in *Syres* v. *Oil Workers International Union*, 350 U.S. 892, in which this Court summarily

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Board's 8(b)(2) and 8(a)(3) conclusions, and only one rejected its conclusions concerning Sections 8(b)(1)(A) and 8(a)(1). *National Labor Relations Board* v. *Miranda Fuel Company*, 326 F. 2d 172 (2d Cir. 1963).

[2] This Court has demonstrated that it is well aware of *Miranda*, even though it has refrained from passing on the correctness of the decision. *Local 100* v. *Borden*, 373 U.S. at 696 (n. 7); *Humphrey* v. *Moore*, 32 U.S.L. Week 4055, 4058 (n. 5) (Jan. 6, 1964).

reversed the decision of the Fifth Circuit affirming the District Court's dismissal of the complaint therein for lack of jurisdiction, does not furnish an adequate basis for the granting of the Writ. It may be noted at the outset that, as observed by then-Professor, now Solicitor General, Cox in his article, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 174 (1957), ". . . there is no way of knowing whether the [Syres] case is only a precedent for the principle that there is a statutory duty enforceable in a proper proceeding or for the proposition that an action at law may be maintained in the Federal court." The Board has earlier ruled that revocation of certification exists as a remedy for a breach of fair representation, *Hughes Tool Company* v. *NLRB*, 147 F. 2d 69 (5th Cir. 1945); *Larus and Brother Company*, 62 NLRB 1075. See also *Wallace Corporation* v. *NLRB*, 323 U.S. 248. Prior to *Miranda*, however, the Board had not specifically held that a bargaining agent's breach of its duty of fair representation constituted an unfair labor practice under Section 8 of the Act. That doctrine has been enunciated since this Court's decision in the *Syres* case. Read with this Court's holdings in *Garmon* and subsequent cases, it is submitted that the effectiveness of *Syres*—within the context of the National Labor Relations Act [3]—is at least considerably weakened, to the extent that it stood for the latter proposition suggested by Professor Cox.

A recent case taking exactly this position is *Stout* v. *Construction Laborers Council*, 55 LRRM 2464 (N.D. Ill. December 31, 1963), in which District Judge Decker held that a United States District Court did not have jurisdiction of an action brought by Negro members of a union to enjoin

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[3] Under the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. 151, *et seq.*, of course, no administrative remedy exists, and enforcement of the duty of fair representation may be had only in the courts. *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U.S. 192; *Tunstall* v. *Railroad Terminal*, 323 U.S. 210; *Conley* v. *Gibson*, 355 U.S. 41

the union from operating a hiring hall in a manner discriminatory toward the Negro members. The court held that such action would constitute a violation of the National Labor Relations Act and was, therefore, within the exclusive jurisdiction of the Board. The court's discussion of the issue is worthy of note. It stated, at 55 LRRM 2466, as follows:

> "The plaintiffs argue that in several cases decided under the Railway Labor Act, the Supreme Court has held that a labor union is prohibited from racial discrimination among its members, and that Federal Courts have jurisdiction to enjoin such activity. See Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 15 LRRM 708 (1944); Tunstall v. Brotherhood of Local Firemen and Enginemen, 323 U.S. 210, 15 LRRM 715 (1944); Conley v. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957).
>
> "Further, in the case of Williams, et al., v. Yellow Cab Co., 200 F. 2d 302, 31 LRRM 2152, the Court of Appeals of the Third Circuit stated that 'It is clear that the duty thus imposed upon a statutory collective bargaining representative by the Railway Labor Act is likewise imposed by the National Labor Relations Act upon representatives exercising similar powers by virtue of that act.' (*Id.* at p. 304.). The Court went on in that case to hold that the Federal Court lacked jurisdiction to enjoin racial discrimination since the union members there had become members voluntarily and not under compulsion or Federal statute. However, in Syres v. Oil Workers International Union, 223 F. 2d 739, 36 LRRM 2290, the Fifth Circuit, which relied upon the Williams case to dismiss a suit for injunction of a union from racially discriminating among its members for a lack of jurisdiction, was reversed in a *per curiam* decision without opinion by the Su-

preme Court of the United States, 350 U.S. 892. On the basis of the Supreme Court's reversal of the Syres case, the plaintiffs really rest their entire case.

"While it is true that the Supreme Court has not since ruled on the question as to whether or not Federal District Courts have jurisdiction to enjoin racial discrimination by unions which are regulated by the N.L.R.B., and while it seems that standing alone that decision would indicate that Federal Courts do have such jurisdiction, it seems to me that since the Gamon case was decided subsequent to the Syres decision, and that since the policy of the Supreme Court is now to vest primary and exclusive jurisdiction in the N.L.R.B. whenever conduct complained of is arguably subject to the National Labor Relations Act, as amended, that the Syres precedent ought to be disregarded and that Count I should be dismissed for lack of jurisdiction over the subject matter.

"Recently the National Labor Relations Board has apparently moved toward a policy of finding that racial discrimination by a union violates Sections 8(b)(1) and 8(b)(2) of the N.L.R.A. (29 U.S.C. 158(b)(1) and (2)). Hughes Tool Co., 52 L.R.R. 247, is a National Labor Relations Board case in which a trial examiner held on February 26, 1963, that racial discrimination by a union violates those sections of the Act. The Board still has not ruled as to whether or not it will adopt the findings of the trial examiner.

"However, in the related matter of determining whether union or employer conduct in representative elections has been fairly conducted, the Board has several times held that appeals to racial bias will void an election. See Pioneer Bus Co., 140 N.L.R.B. #18, 51 LRRM 1546; Sewell Mfg. Co., 140 N.L.R.B. #24, 51

LRRM 1611; Local Union No. 12, United Rubber Workers, Gadsden, Alabama, 52 LRRM 289; Boyce Machinery Corp., 141 N.L.R.B. #76, 52 LRRM 1393.

"I would say that on the basis of the Garmon case and the trial examiner's finding in the Hughes Tool Co. case, the defendants' argument, that primary and exclusive jurisdiction over the allegations of Count I is vested in the N.L.R.B., is correct, and therefore Count I should be dism[illegible] for lack of jurisdiction over the subject matter."

It will be noted that the Court relied, as a current statement of the Board's position, upon the trial examiner's intermediate report in the case of *Hughes Tool Co.*, Case Nos. 23-CB-429 and 23-RC-1758, Intermediate Report No. 93-63, issued February 26, 1963. The conclusion of the District Court is made stronger still by consideration of the Board's decision in *Miranda*, in addition to the trial examiner's intermediate report in *Hughes Tool Co.*[4]

It is clear that, at the present time, the admitted duty of fair representation is enforceable through unfair labor

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[4] The trial examiner's theory in *Hughes Tool Co.* is supported by Professor Cox's article, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957). Professor Cox noted at the outset that, "Every union representing employees in businesses affecting commerce is, therefore, subject to a duty of fair representation, imposed by the National Labor Relations Act, without regard to whether the complaining employees have had the union imposed upon them by force of the statute or have designated it by voluntary membership." Id. at 155. After concluding that the duty of fair representation applies to all forms of hostile discrimination, Professor Cox expounds the reasoning under which all of a union's obligations in negotiating and administering a collective bargaining agreement as the exclusive bargaining representative of the employees may fall within the union's obligations under Sections 8(b)(3) and 8(d) of the Act. Concentrating on the 8(b)(3) rationale used by the trial examiner, Professor Cox concluded that, "In my opinion, therefore, breach of the duty to bargain fairly should be held an unfair labor practice." Id. at 173.

practice proceedings under the Act, insofar as National Labor Relations Board rulings are concerned. This view, at least with respect to Section 8(b)(1)(A), has not been reversed by any United States Circuit Court of Appeals. The law writers appear to agree with the main proposition although varying as to the *rationale* for such proposition.[5] It is respectfully submitted that the instant decision of the Supreme Court of Pennsylvania does not present the kind of case which would warrant, under the applicable rulings of this Court, the granting of the Petition herein.

It has been demonstrated above that, as found by the Pennsylvania Supreme Court, the action of Petitioners here was not based upon breach of contract. Therefore, there is no jurisdiction under Section 301 of the Act or this Court's decision in *Smith* v. *Evening News Association*, *supra*.

For the same reason, this Court's recent decision in *Humphrey* v. *Moore*, 32 U.S.L. Week 4055 (January 6, 1964), is of no avail to Petitioners. All of the opinions in that case appear to treat the allegations that the Joint Committee exceeded its contractual authority and that the decision of the Committee was obtained by dishonest union conduct, in breach of its duty of fair representation, as the actual basis for the majority's finding of jurisdiction under Section 301. Stated otherwise, the jurisdictional finding was premised on the decision of the Joint Committee which resulted in Moore's discharge. Additionally, this Court agreed with the conclusion of the Kentucky Court of Appeals that the action there was one to enforce a collective bargaining agreement. Here, the situation is very different. The action is founded entirely upon a claim of breach of fair representation. As noted above, unlike *Humphrey*, the thrust of the Complaint was at the execution

[5] See, for example, Professor Cox's reading of Section 8(b)(3) in this regard; footnote 4, *supra*.

of the 1959 agreement, as was found by the Pennsylvania Supreme Court. Also unlike *Humphrey*, the union here refused under the 1957 agreement to agree to the employer's proposal to combine the seniority lists. Finally, under the 1957 agreement, Petitioners admit that grievances filed by certain Iron Works Employees were dismissed by an arbitrator appointed under the provisions of that agreement. No claim is made that that proceeding was not fair in all respects (¶51 of Complaint, App. C of Petition, p. 60).

For the reasons stated above, the complaint here is not, as a matter of substance or form, one for breach of a collective bargaining agreement. If *Humphrey* has any pertinency to the instant case, it provides additional authority for the conclusions of the Court of Common Pleas that, completely apart from the jurisdictional issue, the complaint stated no cause of action. Indeed, the latitude afforded statutory bargaining representatives in dealing with questions of contract administration, such as seniority, was reaffirmed in *Humphrey*, citing *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 338. See also *Holman* v. *Industrial Stamping Company*, 344 Mich. 235, 74 N.W. 2d 322 (1955); *Holman* v. *Industrial Stamping Company*, 142 F. Supp. 214 (E.D. Mich. 1956).[6]

CONCLUSION

In sum, the case presented is solely one for breach of the duty of fair representation and, as such, easily satisfies the "arguable" test set forth in *Garmon*. Nor can Petitioners succeed in their attempt to convert the issue here into one of breach of a collective bargaining agreement.

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[6] Contrary to the assertion of Petitioners (Petition, pp. 12-13), the *Holman* cases also ruled on the jurisdictional issue in a manner consistent with Respondents' position herein and are not subject to the distinctions attempted by Petitioners.

Petitioners do not question the rule in *Smith* v. *Evening News Association*, *supra*. They appear to view this case as involving a breach of contract:

> Inasmuch as the remedy for breach of contract is not within the exclusive jurisdiction of the National Labor Relations Board, *Smith* v. *Evening News Association*, supra; *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U.S. 437, 444, 75 S. Ct. 489, 492 (1955), this action against the union based upon its failure to secure the remedy for the plaintiffs must likewise not be within its exclusive jurisdiction." (Page 19 of Petition.)

The Supreme Court of Pennsylvania has ruled that the Complaint did *not* involve a violation of the labor agreement. As indicated above, this ruling and the Court's decision that the conduct of Respondents is arguably subject to the Act and, therefore, within the exclusive jurisdiction of the Board and is both correct and consistent with the applicable decisions of this Court. Certain it is, however, that the question of the Court's ruling on the pleadings does not raise an issue of general importance in the administration of the law which should be reviewed by the Supreme Court of the United States.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 13, 1964